IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-832

CARL E. MILLER, et al., CYRIL M. PELICAN, et al., EARL BORDEN, et al., and AVON TOWNSHIP

Petitioners

vs.

DAVID CALHOUN, et al., Members of the STATE BOUNDARY COMMISSION, and JAMES S. HYDE

Respondents

and

CITY OF ROCHESTER, MICHIGAN,

Respondent

BRIEF OF RESPONDENT CITY OF ROCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For the purposes of clarity, Respondent City of Rochester restates the questions presented as follows:

1. Does an annexation pursuant to a State law which permits annexation of unincorporated township territory to a city without a referendum vote where one hundred or fewer persons reside in the territory to be annexed, but which permits such a vote if more than one hundred persons reside in the annexed territory, either facially or as construed by Michigan courts and as administered by the Respondent State Boundary Commission, violate the rights of residents of the territory to be annexed or of the persons residing elsewhere in the Township.

   A. Under the due process clause or equal protection clause of the Fourteenth Amendment to the United States Constitution?

or

   B. Under the Voting Rights Act of 1965 (42 USC 1971)?

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Respondent City of Rochester, Michigan, respectfully shows why the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied in the above entitled cause.

STATEMENT OF THE CASE

The reference to the stay of annexation contained on page 4 of Petitioners' Brief should be expanded by showing that the stay referred to was one granted by the Michigan Court of Appeals in December, 1978, of the Order of Circuit Judge Jack W. Warren, Ingham County Circuit Court, dated November 29, 1978, affirming the Order of the State Boundary Commission and fixing an effective date of the annexation which is the

subject matter of that cause and the present cause. The Stay Order was dissolved by decision and Order of the Michigan Court of Appeals dated April 21, 1980, entitled *Avon Township vs. State Boundary Commission*, 96 Mich App 736. Application by the Township of Avon to the Michigan Supreme Court for leave to appeal was denied by Order dated November 25, 1980, and the annexation became effective at that time. The decision of the Michigan Courts was that the case of *Midland Township vs. State Boundary Commission*, 401 Mich 641 (1977), App Dism. 435 U S 1004 (1978), was controlling and that the annexation complained of was valid in all respects. With this exception the statement of the case contained in Petitioners' Brief sufficiently describes the litigation in the Federal Courts.

ARGUMENT

The reasons submitted by Petitioners at pages 6 through 16 of their Brief do not satisfy the considerations governing review on certiorari as set forth in Supreme Court Rule 19.

I

REGARDLESS OF WHETHER THE DISMISSAL OF THE APPEAL IN *MIDLAND TOWNSHIP vs. STATE BOUNDARY COMMISSION* (cited page 6, Petitioners' Brief), IS A BINDING PRECEDENT AS TO THE PRESENT CASE, THE DECISION CERTAINLY SUPPORTS THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.

Both the District Court and the Circuit Court of Appeals cited other precedents clearly of a binding nature and Petitioners cite no case in support of their claims which conflict with these precedents.

Regardless of whether a Federal question was properly and timely raised in *Midland*, there can be no doubt that there was in fact no substantial Federal question raised in that case. The Michigan Court of Appeals found that the present case was controlled by the *Midland* decision (*Avon Township vs. State*

Boundary Commission, 96 Mich App 736 (1980), Lv den, ____ Mich ____, November 25, 1980).

One reason for the lack of a *substantial* Federal question in *Midland* as in this case is that there are numerous authoritative precedents deciding that there is no Federal Constitutional right to an election on a municipal boundary change. The controlling case is *Hunter vs. Pittsburgh*, 207 US 161, 28 S Ct 40, 52 L. Ed 151 (1907). The Petitioners cite a number of cases that they claim have impaired the authority of *Hunter;* but all of these cases have been examined by the courts previously with respect to their effect on *Hunter*, and it is the consensus of judicial decision that there has been no impairment of *Hunter* with respect to the procedures adopted by states in establishing a method for annexing territory to cities.

The vitality of *Hunter vs. City of Pittsburgh* was reaffirmed as recently as 1967 in the Sixth Circuit Court of Appeals in the case of *Detroit Edison Company vs. East China Township School District No. 3*, 378 F 2nd 225, cert den. 389 US 932 (1967).

Cases from other Circuits to the same effect include *Hammonds vs. City of Corpus Christi*, 343 F 2nd 162, Fifth Circuit, cert den. 382 US 837 (1965), and *International Harvester Company vs. Kansas City*, 308 F 2nd 35 (Tenth Circuit, 1962), cert den. 371 US 948 (1963).

The case of *Weber vs. Thousand Oaks City Council*, 9 Cal 3rd 950; 109 Cal Rptr 553; 513 P 2d 601 (1973), was relied upon by the District Court and the Circuit Court of Appeals because it is not only very similar in nature to the present case but in addition it reviews the voting rights cases relied upon by the Petitioners, and finds them inapplicable.

In addition to the *Weber* case the case of *Thompson vs. Whitley*, 344 F Supp 480, E.D. N.C. (1972), stands for the proposition that an annexation statute which permitted municipalities in certain counties to annex without a vote of the territory to be annexed if the annexing municipality was under 5,000 popula-

tion while denying the same privilege to municipalities of the same size in other counties except by a favorable vote of the area to be annexed, was not unlawful.

The Petitioners disagree with the results in these cases but are unable to cite any case in which a contrary result was reached.

The case of *Holt Civic Club vs. City of Tuscaloosa*, 439 US 60 (1978), is cited by the Petitioners at page 18 of their Brief. They claim that had the facts in that case been different that the result would have been different (Petitioners' Brief page 11). Petitioners may be correct in their allegation, but this is certainly too speculative to constitute any support for their position. In the *Holt* case a statute conferred police jurisdiction around Tuscaloosa's corporate limits for a distance of three miles on the City. This made residents of the Holt area subject to the City's "police and sanitary regulations" and to the City's power to license businesses, trades and professions. The challenge by the plaintiff was that the exercise of the police power over the Holt residents without extension of the voting franchise on an equal footing with City residents denied the plaintiffs rights under the due process and equal protection clauses of the Fourteenth Amendment. The Court held that the challenged statute did not violate the Constitutional provisions since appellants had no right to vote in Tuscaloosa elections. Respondent would argue that even if the *Holt* case had been decided adversely to the City, that the case would not constitute a precedent contrary to Respondent's position or support the Petitioners. The Court said that in this particular case there was a good reason for making nonresidents subject to limited jurisdiction of the City without conferring the right to vote on such nonresidents. The *Holt* case does not affect annexation cases. The persons included within the area to be annexed to the City of Rochester are now, and have been since November 25, 1980, full fledged citizens of the City of Rochester with all

the same rights and privileges as any other citizen, including all voting rights.

II
THE VOTING RIGHTS ACT IS NOT VIOLATED.

Petitioners claim that the Voting Rights Act is not limited to racial standards (page 15, Petitioners' Brief) and that neither the District Court nor the Circuit Court of Appeals considered the effect of that Act on this case.

Whether the Voting Rights Act applies to all forms of discrimination is not an issue in this case. What is an issue is whether that Act has any application *where no election is held or is required to be held* under any law or Constitutional provision. The answer is clear: The Voting Rights Act applies only when a determination is being made as to "whether any individual is qualified under State law or laws *to vote in any election* * * * " (Voting Rights Act of 1965, 42 USC § 1971(2) (page 3, Petitioners' Brief).

The Voting Rights Act does not speak to the need to have an election on a municipal boundary change; even if, under different facts, in another boundary change, proposed in a different area, an election could be sought and obtained.

The Petitioners' contention that the District Court and the Sixth Circuit Court of Appeals did not consider the claimed violation of the Voting Rights Act seems to be founded on their disappointment that these Courts were totally unimpressed with Petitioners' argument — not that the claim was not considered.

In fact the District Court dismissed the Petitioners' contention with the following language:

> "Underlying a contorted effort to make a voting rights case out of an annexation case is a complaint that the Michigan State Boundary Commission is not doing its job properly." (A 6a)

The Circuit Court of Appeals recognized Petitioners' claim

had been made but, since Petitioners did not, in either Court support their claim with any citation of authority or credible argument, there was really nothing for the Court to discuss in a formal Opinion.

CONCLUSION

There are no considerations calling for a review of this case on certiorari under Rule 19 or otherwise, and the Petition should therefore be denied.

Respectfully submitted

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